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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **QUINCY POWELL, JR.,** **Defendant and Appellant.**	**A127154** **(San Mateo County Super. Ct. No. SC061116)**

Defendant Quincy Powell, Jr. (appellant), appeals from a judgment entered after this court remanded for resentencing in a previous appeal (*People v. Powell* (Apr. 30, 2009, A119300) [nonpub. opn.] (*Powell I*)). Appellant contends the sentence imposed on remand constitutes cruel and/or unusual punishment in violation of the federal and state Constitutions. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

An amended grand jury indictment charged appellant with eight offenses. The first seven pertained to crimes against a single victim, Alice K. (Alice): robbery (Pen. Code, § 212.5)[2] (count 1), criminal threats (§ 422) (count 2), three counts of forcible rape (§ 261, subd. (a)(2)) (counts 3, 4 and 5), forcible sodomy (§ 286, subd. (c)(2)) (count 6),

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1 This summary is taken from our decision in *Powell I*.

2 All undesignated section references are to the Penal Code.

and forcible oral copulation (§ 288a, subd. (c)(2)) (count 7). Count 8 alleged that appellant robbed a teller at a Wells Fargo bank on the same day. (§ 212.5.) The indictment further charged appellant with using a deadly and dangerous weapon (a cutting instrument) as to counts 1 (§ 12022, subd. (b)(1)) and 3 through 7 (§§ 12022.3, subd. (a), 667.61, subd. (e)(4)). In addition, the indictment alleged that appellant had three prior convictions for purposes of section 1203, subdivision (e)(4), section 1170.12, subdivision (c)(2), and section 667, subdivision (a); three prior prison terms for purposes of section 667.5, subdivision (b); and one prior conviction for purposes of section 667.6, subdivision (a). A serious felony allegation was added in an amended indictment.

Appellant entered a plea of not guilty and denied the allegations. The matter proceeded to a jury trial on all counts, and the prior conviction allegations were bifurcated.

Crimes Against Alice

Alice testified that a man knocked on the door of her residence in the morning of October 3, 2005, said he had a problem with his car, and asked if she could help him jump-start his vehicle. At trial, Alice identified the man as appellant, asserting she was "one-hundred percent certain" of the identification.

Alice agreed to help, thinking appellant's car was parked across the street. She walked out of her house to her car, which was parked in her driveway. When she got in, appellant jumped into the passenger seat and said his car was at a bend in the road. Alice drove toward the bend but did not see a car there. Appellant told her she was "really stupid" to open her door for him, but not to worry because he was "a man of God . . . on drugs" and only needed money.

Alice told appellant she did not have much money because she worked at a local high school. Appellant assured Alice that he would not hurt her. Alice told appellant that she did not have any money with her, but she would give him money she had at her home. She drove back to her house with appellant; she was very afraid. She asked appellant to wait outside the house while she got the money, but he pushed his way inside.

Alice gave appellant $30 from her wallet. He insisted it was not enough, and she replied it was all she had. Taking the money, appellant headed toward the front door and instructed Alice to sit on an ottoman and not call the police. At the door, however, appellant stopped, turned around, and told Alice to take off all her clothes. When she refused, appellant asked, "Do you want to live or not?" Alice took off her clothes except for her underwear. Appellant told her to remove her underwear, she refused, and appellant again asked, "Do you want to live or not?" Alice complied and was terrified. Appellant began to remove his clothing and ordered her to spread her legs. Alice then noticed he had a box cutter or "exacto" knife in his hand; she complied with his demands out of fear, thinking he might kill her.

Appellant tried to insert his penis into Alice's vagina. As he did, he touched her breast. Alice told him that her breast was not real and she had been sick with cancer. Appellant replied, "Don't be such a crybaby."

After penetrating her and thrusting for a few minutes, appellant said something like, "this isn't working." He removed his penis and ordered her to the floor. When she complied, he again penetrated her vagina. A few minutes later appellant became frustrated and said "this isn't working" and "[i]t will have to be doggie-style." He removed his penis and told her to turn over on her stomach. After she did so, he penetrated her vagina a third time and then penetrated her anus. When she screamed in pain, he told her to be quiet. Appellant next ordered her to the ottoman and demanded she "suck" his penis. She said she could not do it, and he again asked, "do you want to live or not?" Alice complied.

Still unable to ejaculate, appellant was angry and frustrated. He removed his penis and told her: "This is not working" and something like, "Oh, I give up. Just give me the money and the goh." Alice did not know what "goh" was until he demanded her jewelry; she then realized he meant "gold." When Alice told appellant she had no jewelry, he brought his hand down hard on her neck in anger; she felt a liquid dripping down her body and realized he had stabbed her with the box cutter.

Bleeding "all over the floor" and believing she was going to die, Alice went to the kitchen. When she saw that appellant was rifling through her purse in the dining room, she ran out the front door to a neighbor's house.

The Bank Robbery

On the same morning as the attack on Alice, Refugio Huerta was working as a teller at the Redwood City branch of Wells Fargo bank. At approximately 10:45 a.m., a man wearing a red beanie approached and handed her a note that read, "I have a gun." Frightened, Huerta gave the man $6,360 from her cash drawer, and he left the bank with the money. At trial, Huerta was not 100 percent sure appellant was the robber, because by the time of trial he had grown facial hair. He did, however, bear similarities to the robber. In addition, Huerta identified a red beanie as the beanie worn by the robber. DNA testing revealed that appellant was a major contributor of the DNA found on the beanie.

Jury Verdict and Sentence, Decision in Powell I, *and Resentencing*

The jury found appellant guilty on all charges and found that all the weapon use allegations were true. The trial court found that all the alleged priors were true. Appellant was sentenced to an aggregate term of 95 years to life in state prison.

In our decision in *Powell I*, this court affirmed the jury's verdict and remanded for resentencing because the trial court failed to impose prior serious felony conviction enhancements (§ 667, subd. (a)) on every applicable count.

On remand, the trial court imposed a sentence of 141 years to life. This appeal followed.

DISCUSSION

Appellant contends his 141-years-to-life prison sentence constitutes cruel and/or unusual punishment in violation of the federal and state Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.)

Appellant never raised this argument in the trial court and, therefore, he is barred from raising it on appeal. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) In any event, we also reject the argument on its merits.

Under the state constitutional standard, a sentence is cruel or unusual if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (*Lynch*).) Under California law, we "consider the nature both of the offense and of the offender." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494 (*Martinez*).) The prohibition against cruel and unusual punishment under the federal Constitution is applicable in noncapital cases only in exceedingly rare or extreme cases involving sentences that are grossly disproportionate to the offense. (*Ewing v. California* (2003) 538 U.S. 11, 20-21 (*Ewing*).)

The factors utilized by courts to determine disproportionality under the California Constitution are: (1) the nature of the offense and/or the offender; (2) a comparison of the offender's punishment to punishment for the same offense in other jurisdictions; and (3) a comparison of the present punishment to punishments imposed in California for more serious offenses. (*Lynch*, *supra*, 8 Cal.3d at pp. 425-427; see also *Martinez*, *supra*, 76 Cal.App.4th at p. 494.) Defendant has not presented any argument based on those factors that the punishment imposed by the trial court is disproportionate. Instead, he asks us to overturn the sentence based on a dissent from many years ago by Justice Mosk: "A sentence . . . , that cannot possibly be completed in the defendant's lifetime, makes a mockery of the law and amounts to cruel and unusual punishment. [Citations.]" (*People v. Hicks* (1993) 6 Cal.4th 784, 797 (dis. opn. of Mosk, J.); see also *People v. Deloza* (1998) 18 Cal.4th 585, 600-601 (conc. opn. of Mosk, J. (*Deloza*)) ["A sentence of 111 years in prison is impossible for a human being to serve, and therefore violates both the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution and the cruel or unusual punishment clause of article I, section 17 of the California Constitution."].)

In *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383 (*Byrd*), the Third District considered Justice Mosk's concurring opinion in *Deloza*, which addresses more fully the constitutional issue touched upon briefly in the dissenting opinion in *Hicks*. The *Byrd* court noted that because no other justice on the Supreme Court joined in Justice Mosk's

concurring opinion in *Deloza*, it has no precedential value. (*Byrd*, at p. 1383.) In addition, the *Byrd* court stated, "In any event, we respectfully disagree with Justice Mosk's analysis. In our view, it is immaterial that [a] defendant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life. However, imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state Constitution (*People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311), or the federal Constitution. (*Harmelin v. Michigan* (1991) 501 U.S. 957 [sentence of life without possibility of parole not cruel and unusual for possession of 672 grams of cocaine].) [¶] Moreover, in our view, a sentence such as the one imposed in this case serves valid penological purposes: it unmistakably reflects society's condemnation of defendant's conduct and it provides a strong psychological deterrent to those who would consider engaging in that sort of conduct in the future." (*Byrd*, at p. 1383.)

We agree with the reasoning in *Byrd*, and, considering appellant's record of recidivism[3] and the gravity of his present offenses, we reject his claim of cruel and/or unusual punishment.

In *Powell I*, this court took judicial notice that, before the original trial court sentencing, appellant was sentenced to a term of 28 years to life in Alameda County Superior Court case No. CH40412, and the judgment therein was affirmed in appeal No. A117361. This court directed the trial court to comply on remand with section 669, which required the trial court to state whether the sentence in this case would run concurrently or consecutively to the sentence in case No. CH40412. On remand, the trial court ordered that the sentence imposed in this case be served consecutively with "any

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3 In reviewing the proportionality of the punishment imposed, it is appropriate to give considerable weight to the fact that appellant is a recidivist offender, who has apparently not learned from his prior incarceration. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510-1511; *People v. Stone* (1999) 75 Cal.App.4th 707, 715.) Recidivism is also a legitimate factor under the federal Constitution. (*Ewing, supra*, 538 U.S. at pp. 25, 29.)

other sentence imposed." However, the minute order and abstract of judgment do not reflect that order. We will direct the court to amend the minute order and abstract of judgment.

DISPOSITION

The matter is remanded with instructions that the trial court amend the October 16, 2009 minute order and December 17, 2009 abstract of judgment to reflect that the sentence in this case shall run consecutively to the sentence imposed in Alameda County Superior Court case No. CH40412. The judgment is otherwise affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.